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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 39.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

On page 4 of the Brief for the Board, in Note 1, it is said that the employees in the two departments, Nos. 280 and 281, involved in this case are bushelmen, and there is a reference to the Dictionary of Occupational Titles for a definition of "bushelman" as "a general tailor." The employees in these departments are not all tailors or bushelmen, but they include fitters, markers, tailors, tailoresses, finishers, pressers, operators, examiners and rippers (R. 109).

On page 6 of the Board's Brief, in Note 3, it is said that as a result of collective requests by the employees in De-

partment 280, 75 per cent of them received a salary increase in 1941 and all received an increase in 1942. The record shows that the salary increases received by these employees were not in accordance with any request for a specific increase but were on an individual basis and were not all the same flat amount or the same percentage (R. 145, 100).

On page 11 of the said Brief references are made to Petitioner's announcements of September 1, 1943, and September 3, 1943, and it is said that in both announcements Petitioner "**stressed**" the voluntary nature of the increase and the fact that the retroactive increase would be paid in a lump sum. The announcements which are set forth in full in the record (R. 204-206A) show no such stress.

On page 12 of the said Brief it is said that Petitioner's vice president did not explain what prompted him to make the announcement of September 11, 1943. The record shows that the Board's Attorney selected from that announcement and read into the record only three sentences (R. 189-190). The Board cannot now say that Petitioner did not explain what prompted the announcement, since the record does not show whether or not such explanation was made. Obviously, the Board offered these fragments of the announcement of September 11 only for the purpose of showing that the application for approval of the increase was made known to all the employees. The Board's Attorney asked Petitioner to stipulate, as follows:

> "The application referred to in the last quoted portion of the speech has reference, does it not, Mr. Tucker, to the War Labor Board wage application?
>
> "Mr. Tucker: That is right" (R. 190).

A.

The Joint Council.

The Brief for the Board significantly ignores the Petitioner's Specification of Error No. 1 and its argument under "A." We can only assume that the Board could not answer Petitioner's argument that the action of the Board in holding the election, with the Joint Council as the only name on the ballot, on its order which contained the improper finding that the Joint Council had membership among the employees, destroys any presumption of validity which might otherwise attach to the Board's certification, and was arbitrary, unreasonable and capricious.

The Board could not dispute the facts that not one employee had designated the Joint Council as his representative (R. 89-90); that the employee, Verderber, a member of the Master Committee of the Local, who testified, did not know of any relationship between the Local and the Joint Council until about a month before the hearing (R. 101); that the filing of the petition by the Joint Council was concealed from the employees and that the Union misrepresented the fact to the employees and misquoted the official Board notice and repeatedly stated that the petition had been filed by Local 372 (R. 161-164).

The Board could not dispute the fact that in the face of all the evidence to the contrary, it held out to the employees that a substantial number of their fellow employees were members of the Joint Council, and the Board does not even contend that this arbitrary action on its part did not influence the result of the election.

The Board says that it is not concerned with the "technicalities of the laws of agency," and that it was not required to determine the representative status of the Joint Council, but it does not attempt to deny or explain the proof that it consciously misrepresented the facts and influenced the result of the election.

The Board says that the Petitioner cannot complain of the Board's arbitrary action, but Section 9 (d) of the Act provides for a review of the Board's action in a representation case when that action becomes the basis of a complaint and order against the employer under Section 10 of the Act.

Petitioner submits that the Board did not defend its action because there was no defense available to it.

B.

The Unit.

The Brief for the Board on page 62 quotes from Section 9 (b) of the Act the statutory standard for the Board's guidance in unit determinations, as follows:

> "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act."

But the Board, significantly, ignores the fact pointed out by Petitioner that the unit in this case was admittedly not for the benefit of the employees in the unit, but to aid one of two competing labor organizations conducting rival campaigns to organize the entire store. The CIO publicly stated: "**New Plan of Action.** Local 372-CIO has filed a petition for an election for all the tailors. This is the first of a series of election petitions for various groups of employees. Others will follow shortly." * * * "Remember. This new plan in no way conflicts with our final goal of a 100% Union store. We believe this new approach may do the job faster." * * * "By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one union in the store" (R. 163). And, "Where we will petition next depends upon only one thing. That is which group is ready next" (R. 166).

The reference on page 65 of the Board's Brief to a subsequent election should not be considered in this case. The

Petitioner is precluded from showing the true facts involved in the case mentioned by the Board because they are outside the record in this case. Doubtless it is proper to refer to reported decisions of the Board for the purpose of showing administrative practices of the Board, but certainly the Board may not introduce in this Court as facts its own statements made in other cases which are not before this Court and as to which the Petitioner is unable to reply.

The Board's Brief states, on page 66, that "Petitioner's fears that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative." We submit that there is nothing speculative about Petitioner's fears. The Union has said in so many words that there will be a long series of elections, not on a craft basis, it is true, but on the basis of which department is "ready next." And the Petitioner has no reason to believe that the A. F. of L. will not follow the example of the CIO.

The Board says (Br. 67) that there is no inconsistency between its partial reliance on the physical separation of the busheling departments from the department where women's clothing is altered and its disregard of the fact that Department No. 280 on the second floor is physically separated from Department No. 281 in the basement. The inconsistency seems clear. And on page 67 of its Brief the Board, without denying inconsistency, states as a reason for excluding the women's alteration department that another union claimed in 1942 to represent employees in that department, but disregards the fact that in this very case the A. F. of L. claims the right to represent the employees of the busheling departments in a store-wide unit (R. 5, 6). The Board denies that its action in grouping in one unit the employees engaged in altering men's and women's and boys' clothing in the case of J. L. Brandeis & Sons, 47 NLRB 614, 617, shows impropriety in excluding the

women's alteration employees from the unit in this case. But the Board makes no attempt to answer the Petitioner's contention that the Brandeis case and the case of Matter of May Department Stores Co., 39 NLRB 471, 478, together with other evidence in the case, disproves the Board's statement that traditionally men's and women's alteration workers in retail stores have been represented by separate craft unions.

C.

The Application for Approval of the Store-Wide Salary Increase.

The Brief for the Board contends with many citations that, assuming its certification of the Joint Council was valid, the Petitioner was under a duty to bargain with the Joint Council for wages, hours and working conditions of the employees in the unit, and that the Petitioner failed in that duty when it stated its willingness to include the employees in these two departments with 4500 other employees of the store in the application for approval of a store-wide salary increase. But this adds nothing to the fact that the Petitioner had expressly refused to bargain with the Joint Council in its letter of July 19, 1945 (R. 194) in which it stated that it would contest the Board's jurisdiction and the certification and the unit by the only means the law provides, which is by refusing to bargain. The cases cited by the Board do not hold that the granting of a wage increase, without more, is an independent violation of Section 8 (1) of the Act, but only that it may prove refusal to bargain.

The Brief for the Board, on page 21, states that in the case of Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678, "The Court held that the employer, 'by ignoring the union as the employees' exclusive bargaining representative' when making a change in wage rates, had violated

Section 8 (1) of the Act." The Board has misinterpreted the Court's opinion in that case. The Court held that the employer had violated Section 8 (1) of the Act by **negotiating** with the employees and "quite apart" therefrom had also violated that section of the Act by granting an increase, in response to an offer of the employees, **to induce them to leave the union.**

The Board in its Brief (p. 30) recognized and stated the full effect of Petitioner's application for approval of the salary increase and the announcement thereof when it said "and just as individual bargaining is outlawed as the antithesis of collective bargaining, unilateral settlement is necessarily outlawed as the antithesis of bargaining itself." From and after July 19, 1943, the Petitioner refused to bargain with the Joint Council, and this refusal was the only means by which the Petitioner could obtain a review of the certification and the determination of the unit and the question which was then undecided as to whether or not the Board had jurisdiction over a retail store. The Petitioner's filing the application for the store-wide salary increase and the announcement thereof, without first bargaining with the Joint Council as to the employees of Departments 280 and 281, was certainly no more than a continuation of Petitioner's refusal to bargain.

The Board states in plain language (p. 22), "The Board's finding turns not on the motive for the particular change in terms of employment but solely upon the unilateral nature of its effectuation."

Until the Court below mistakenly inferred that the fragments of remarks made by Petitioner's vice-president on September 11 referred to the charge filed by the Joint Council on September 3 (R. 271), the Board had never made any claim that the Petitioner had done more than file the application for approval of the store-wide salary increase and announce the filing to all its employees, with-

out any reference to the employees in Departments 280 and 281, except as they were included in the term "all full time regular and extra employees, selling and non-selling" (R. 204-206A). The Complaint in this case contained only the following allegation with respect to the filing of the application and the announcement thereof:

> "From on or about August 31, 1943, respondent, by its officers, agents and employees, while engaged at the store, as described above, did take steps unilaterally to secure the necessary approval of the National War Labor Board of certain changes with respect to wages, rates of pay, hours of employment and other conditions of employment of the employees in the unit; and did on or about September 1, 1943, seek to undermine the union's majority representation in the unit by informing all employees engaged at its store that respondent had unilaterally taken such steps and intended in the future to take other steps to secure necessary approval of the National War Labor Board therefor" (R. 30-31).

Although this Complaint was issued on September 23, 1943, after the announcement of September 11, 1943, that announcement was not even mentioned in the Complaint on which this case was tried.

The Trial Examiner, whose report was adopted as the only findings of the Board (R. 45), found with respect to the announcement of the applications only as follows:

> "The respondent, subsequent to the filing of its application, by speeches of its superintendent of employment, Griffith McCarthy, and its vice president and general manager, Fred J. Salomon, and through its publication, Store Chat, published to its employees, including employees of the unit in which the Union had been certified as bargaining representative, an account of its unilateral efforts and progress in obtaining approval of its proposed wage increases" (R. 52).

Thus it appears certain that the Board at no time suggested that the Petitioner had done more than file the application and announce to all the employees that the applications had been filed.

However, the Board now states on page 34 of its Brief that the Petitioner "intimated in a speech over the store's public address system that the projected wage increase might be jeopardized if the Union took any steps to vindicate its position as bargaining agent (R. 189-190)." These record references are to the statement made by the Petitioner's vice president over the public address system on September 11, 1943, only portions of which were read into the record by the Board's Attorney at the hearing. They contain no reference whatsoever to the Union and the intimation claimed by the Board is **wholly** without foundation.

As previously pointed out, the record shows that the filing of the Charge in this case by the Joint Council on September 3, 1943, was not disclosed to the Petitioner until September 23, 1943 (R. 28-32), and neither the Petitioner's vice president nor the employees who heard his remarks on September 11, 1943, could have construed his remarks as an intimation that any action of the Union might jeopardize the proposed salary increase. The Board's Attorney who read into the record the reference to the pending applications in the remarks of September 11 (R. 189-190) could, and doubtless would, have read any other portions of those remarks which might have contained any intimation that action by the Union would jeopardize the pending applications. The record shows no such intimation and the decision of the Board makes no such claim.

The Board's Brief, on page 33, contains a speculation on the possibility that the proposed $2.00 per week store-wide increase might prevent the employees of the busheling departments under war conditions from securing any additional increase through the efforts of the Union. This is pure speculation without any foundation whatsoever.

The Board's Brief, on page 37, says "Petitioner could have bargained with the Union concerning the proposed increase insofar as it concerned the employees in the unit and filed a joint application for a wage increase with the Union, while at the same time continuing to refuse to recognize the Union generally." That statement ignores the decision of this Court in the case of **American Federation of Labor v. N. L. R. B.**, 308 U. S. 401, 409, which held that a certification can be reviewed only if the employer refuses to recognize the certified union, and a complaint and order against the employer for refusal to bargain is issued by the Board. No explanation is offered by the Board of its proposal that the Petitioner could bargain with the Joint Council while at the same time refusing to bargain with the Joint Council.

Appendix B to the Brief for the Board shows that the Regulations of the National War Labor Board in effect when the Petitioner filed the application in this case required only the disclosure of whether or not there was a "duly recognized collective bargaining agency," and that the addition of a "labor organization which has been certified by the National Labor Relations Board" was by an amendment of October 1, 1943, after the application in this case had been filed. Nevertheless, the Petitioner made full disclosure of all the facts and stated its willingness that the employees of Departments 280 and 281 should be either included or excluded from the application at the election of the Union (R. 195).

The Board's reference on page 38, Note 30, of its Brief to subsequent proceedings before the War Labor Board, which are outside the record of this case, should not be considered. Petitioner is precluded from showing the actual facts with respect to these proceedings, because the record is not here.

On page 36 of the Board's Brief it says that Petitioner contends, in effect, that its original refusal to bargain with

the Joint Council immunized it from the consequences of further attacks upon the employees' rights. And the Board, having set up that contention, answers it by saying that each invasion of the rights of employees is a separate violation of the Act. But the Board has misinterpreted our position, which is that the failure of the Petitioner to bargain with the Joint Council for the employees of Departments 280 and 281 before Petitioner filed its store-wide application with the War Labor Board was but a continuation of its refusal to bargain with the Joint Council which had been stated clearly in Petitioner's letter of July 19, 1943, to the Joint Council (R. 194). The substance of the Board's argument in its Brief, and the cases which it cites, is merely that where there is a duty to bargain, the granting of a unilateral wage increase is evidence of refusal to bargain. In this case, if Petitioner is correct that there was no duty to bargain with the Joint Council, then of course the filing of the application for War Labor Board approval of the wage increase and the announcement thereof were unobjectionable. But if Petitioner should be held to have been under a duty to bargain with the Joint Council, the filing of the application and the announcement thereof amounted to nothing more than cumulative evidence of Petitioner's refusal to bargain, which requires no proof in addition to Petitioner's letter of July 19, 1943 (R. 194).

Petitioner did nothing to interfere with the rights of the Joint Council or the rights of the employees of Departments 280 and 281 under the Act and nothing in the Record in this case could possibly be construed to be a violation of Section 8 (1) of the Act.

D.

The Scope of the Order.

The Brief for the Board attempts to distinguish this case from the controlling decision of this Court in the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, by stating on page 41:

> "But here, the Board found an independent, serious, and far-reaching violation of Section 8 (1), quite apart from the refusal of petitioner to bargain."

We submit that even if the Petitioner had a duty to bargain with the Joint Council, the record in this case shows no more than a refusal to bargain and a violation of Section 8 (5) of the Act. But even if there were an independent violation of Section 8 (1), the blanket-paragraph 1 (b) of the Board's order, as modified by the Court below, should not be enforced.

The Board says that the Petitioner has not proposed a substitute for paragraph 1 (b) of the Board's order. That is true. Petitioner contends that no order should be made or enforced against it. But if the Court should determine that a substitute for paragraph 1 (b) of the Board's order should be entered, the order directed by this Court to be entered in the Express Publishing Co. case would be appropriate.

The Board suggests four categories into which it says alternative orders of the Board might roughly fall; and as to each such category the Board states its objections which are all to the effect that the employer conceivably might in the future engage in some conduct which the Board would believe to be a violation of the Act but which would not be within the scope of the order. This according to the Board would require a new complaint and a new proceeding before the Board, all of which could be avoided if the Court would enforce an order as broad as the Act. It con-

tends that such a broad order should not depend for enforcement upon any showing "that the employer could be expected again to commit unfair labor practices in the future" (Br. 48). Its argument, that after it has once decided that an employer has violated the Act the employer should thereafter be subject to contempt proceedings on any claim the Board might make of any violation of the Act however unrelated to the original violation, is colorfully stated, as follows:

> "The legislative history of the enforcement provisions of the Act makes it clear that Congress did not intend to give an employer who had violated the Act a 'second free bite at the apple'" (Br. 47).

The argument of the Board's Brief that its blanket orders should be enforced was clearly and forcefully rejected by this Court in the Express Publishing case when it stated:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

The Board's argument has also been fully answered by the many decisions of the Circuit Courts of Appeals cited in our original brief and in the Board's brief.

In a weak effort to show varied violations of the Act by the Petitioner, the Board said on page 49 of its brief that

Petitioner had engaged in **three** unfair labor practices, which it describes as follows:

> "the unilateral wage increase, the written and oral statements, and refusal to bargain collectively."

The Board has overlooked the fact that in this case it has been neither charged nor found that the Petitioner did actually increase any wages, but only that it filed an application with the National War Labor Board for approval of a proposed increase. (R. 30-31), and the record in this case does not show the action of the War Labor Board on the application. So that even if the filing of the application and the announcement to the employees taken together could be considered an independent violation of the Act, they certainly could not be considered two independent violations of the Act. Moreover, the Board has stated, as a reason for enforcing its broad order, that all the acts of the Petitioner of which complaint is made in this case stemmed from its opposition to collective bargaining by the bushelmen as a group (Br. 49).

Attention should be called to the inaccurate statement of the Board that this Court in the Express Publishing Company case said that even a refusal to bargain might warrant an order as broad as the Act if the Board made a "finding based either on the specific circumstances disclosed by the record or on its own expert judgment of their relation to the policy embodied in Section 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair labor practices some of which are enumerated in Section 8" (Br. 53). The opinion of the Court does not support the Board's statement. The Court did note that no such finding was present in the Express Publishing Co. case, but far from saying that the Board could, without evidence, in the record, restrain an employer from acts unrelated to those

found to have been performed, the Court said that the Board could not "restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

Finally, the Board argues, on page 57 of its brief, that reliance may be placed on its discretion not to institute contempt proceedings if the employer should be in genuine doubt as to what acts were prohibited by its order and the Court's decree. This Court said in the case of **J. I. Case Co. v. N. L. R. B.**, 321 U. S. 332, 341:

> "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it."

The Board's reference in its Brief, on page 61, note 45, to other Board cases in which Petitioner was a party is to matters outside the record of this case. The Board may not go outside the record of this case to make statements of alleged facts and support its statements by references to its own statements in other cases which are not before this Court.

CONCLUSION.

It is respectfully submitted that the Brief for the Board has failed to support the Board's order as modified by the Court below. It is submitted that the certification of the Joint Council was unlawful and void; that the determination of the unit was arbitrary, unreasonable and capricious and that there is no evidence in the record to support the Board's finding of an independent violation of Section 8 (1)

of the Act and, finally, that the Board's order is too bro and comprehensive in any event. It is submitted that t decision and decree of the Court below should be revers and the Court below should be directed to enter an ord denying enforcement of the Board's order, or at least mo fying such order so that it will conform to the law.

Respectfully submitted,

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